

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
APPENDIX**



*Original*

**76-1499**

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PAS*

United States Court of Appeals  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*  
*against*

NICHOLAS DEMETROULES and NMD FILM  
DISTRIBUTING CO., INC.,

*Defendants-Appellants.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF NEW YORK

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**APPELLANTS' APPENDIX**

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KASSNER & DETSKY, P.C.  
Attorneys for Appellants  
122 East 42nd Street  
New York, New York 10017



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## Relevant Docket Entries.

## CRIMINAL DOCKET

## UNITED STATES DISTRICT COURT

D.C. Form No. 100 Rev.

John T. CURTIN

C.R.-74-162

"H"

TITLE OF CASE  
THE UNITED STATES

ATTORNEYS

For U.S.:

Theodore Burns, AUSA  
U.S. Courthouse  
INC., Buffalo, N.Y. 14202  
432-3487vs.  
NICHOLAS DEMETROULES and NMD FILM DISTRIBUTING CO.

knowingly did use the Greyhound Bus Company, a common carrier, for carriage in interstate commerce of an obscene motion-picture film, in violation of Title 18, United States Code, Section 1462.

For Defendant:

Paul Chanin Building  
Dated 5/18/74  
122 E. 42nd St., New York  
New York 10017  
661-8190

On Appeal:

Herbert Kazner &amp; Seymour S.

Offense: 12/5/1973

1 Ct.

STATISTICAL RECORD	COSTS	DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 2 mailed	Clerk		Detsky, Chanin Building 122 E. 42nd St., New York New York 10017		
J.S. 3 mailed	Marshal		661-8190		
Violation	Docket fee				
Sec. 1462					

## PROCEEDINGS

DATE  
1974

April 25	Filed Indictment
April 25	J.S. 2 made (Nicholas Demetroules)
May 7	No appearance for the Deft. / Adj. to 5/14/1974 for arraignment before the Magistrate
May 9	Filed Ct. Steno's minutes of 5/7/1974
May 14	Proceedings before the Magistrate - Atty. Paul Warburgh, of counsel for Casner & Detsky, 122 East 42nd St. N.Y., N.Y.; Not guilty plea entered for both defts.; Adj. to 6/4/1974 for discovery motions and/or status report. Mr. Demetroules released on his own recog.
May 20	Filed Ct. Steno's minutes of 5/14/1974
June 4	Proceedings before the Magistrate - Motions/Status - No appearance for Deft. Demetroule. Adj. to 6-18-74, 10:30 a.m. for Govt.'s respond to Deft's request for discovery.
June 18	Proceedings before the Magistrate - No appearance for Deft. Nicholas Demetroules - Govt. requested an adj. for response to deft's request for discovery. Adj. to 7/2/1974 for Govt's response. Set for argument of motions and status report on 7/9/1974--

#### Relevant Docket Entries.

" B

DATE	PROCEEDINGS
July 2	Proceedings before the Magistrate - No appearance for Deft. Govt.'s response to discovery request will be filed today for Deft. Demetroules.
July 9	Proceedings before the Magistrate - No appearance for Deft. Govt. advises it has responded to Deft.'s informal discovery but did not answer all requests. All further discovery motions of Deft. are to be filed by 7-15-74. Govt. to respond by 7-22-74. Argument of motions on 7-30-74 at 10:30 a.m.
July 23	Proceedings before the Magistrate- No appearance for deft. Govt. advised the court that no motions have been filed. Case to go to Judge Curtin.
July 26	Filed Govt's motion to move action for trial.
Sept. 9	Status report. No motions to be made by deft. Court directs case be placed on the trial calendar.
Dec. 3	Filed three subpoenas - Roger Parsons, served 11/25/74; Joel Montague, Joseph Hecket, served 11/29/74; and subpoena (D.T.) - T.G. Mawyer, served 11/27/74
Dec. 5	Filed subpoena - Vincent Martina, ret. unexecuted. New subpoena issued on 12/3/74 for 12/9/74
Dec. 6	Filed subpoena - Vincent Martina, ret. unexecuted; and subpoena ticket Benjamin Wray, served 11-26-74 by the Southern Dist. of N.Y.
1975	
Mar. 10	Filed Deft. Nicholas Demetroules's waiver of right to speedy trial
Mar. 11	Filed letter dated 3/10/75 from AUSA Theodore J. Burns, to the Court - informing the Court that the Govt, is requesting authority from the Dept. of Justice to move for dismissal of the Indictment against Nicholas Demetroules, after deft. corporation NMD Films Distributing Co. had entered a plea of guilty, to the Indictment, and had been sentenced thereon; and that the Govt. had also requested that the Deft. Nicholas Demetroules sign a Waiver of "Right to Speedy Trial," which has been filed with the Clerk of the Court on March 10, 1975 --
Sept. 22	Motion by David Jay to withdraw as local counsel for deft. Adj. to 10-1
1975	copy of
Sept. 23	Filed/letter dated 9/22/75 from Atty. David Jay, to Seymour Detsky, Esq., counsel for defts., re Mr. Jay's continuing to act as counsel for Mr. Detsky in this Dist. etc., for the criminal matters in Cr-1973-183 and Cr-1974-162(filed in Cr-1973-183)
Oct. 14	Motion to withdraw as local counsel. Motion withdrawn
1976	
June 8	Filed defendants notice of motion for an Order dismissing the Indictment for failure to grant defendants a speedy trial, etc., ret. 6/8/76
June 8	Filed Govt's response affidavit in opposition to Defendants' motion to dismiss the Indictment
June 8	Government moves case ready for trial, whereupon at the request of the defts., trial is adj. until 7/20/76. Defts. move to dismiss indictment for lack of a speedy trial. Submitted.
June 11	Filed subpoena Joseph Heckt - served 6-8-76.
June 28	Filed subpoena Vincent Charles Martina returned no service. Filed Order denying defts' motion-to-dismiss; Jury selection is set for 7/20/76--Curtin, J.
July 12	Filed subpoena- Joel John Montague-returned no service.
July 20	Govt. moves case ready for trial, Deft. Demetroules <del>xxxxxxxxxxxxxx</del> whereupon the jury is duly empanelled; Trial is adj. until 8/5/76. Deft. Demetroules enters a plea of not guilty to the Indictment

## Relevant Docket Entries.

UNITED STATES DISTRICT COURT  
CRIMINAL DOCKET

U.S. vs

Nicholas Demetroules and NMD Film Distributing Co., Inc.

74 162

Yr. Docket No. Def.

DATE 1976	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY		
		(a)	(b)	(c) (d)
8/11/76	trial continues from 7/20/76 with the same appearances & jury with the exception that AUSA Theodore Burns replaces AUSA Roger Williams who was present for jury selection. Witnesses are sworn. Trial is adj. until tomorrow. Govt.			
8/12/76	Filed stipulation-re/exhibits 10, 11, 12, 13, 14, 15 and 16, produced by Nicholas M. Demetroules to the Grand Jury, as the Court Reporter Jacques Stehlin who transcribed the proceedings would testify.			
8/13/76	Filed subpoena Ticket - NMD Film Distributing Co., Inc., 8/4/76			
8/12/76	Trial continues from yesterday with the same appearances & jury. Court opens in a motion picture film exhibition room at 498 Pearl St., Buffalo, N.Y. to view a film entitled "The Healers". After viewing the film, the court is adj. until 1:15 P.M. back in the court room. The Government rests. Deft. moves to dismiss the indictment. Motion denied. Trial is adj. until tomorrow.			
8/13/76	Trial continues from yesterday with the same appearances & jury. Court rules on requests to charge. Deft. moves to dismiss the indictment against both defendants because they failed to prove a prima facia case. Motion denied. Attorneys sum up - trial is adj. until 8/16/76.			
8/16/76	Trial resumes from 8/13/76 with same appearances and jury. Jury retires to deliberate. The jury returns-with the following verdict: Deft. is guilty on both counts as charged in the indictment. This applies to both defts. Sentence is deferred 10/4/76			
9/13/76	Filed Order that the time to urge motion for a new trial is extended to 10/4/76; the date of argument of defendant's motion. U.S. Atty. is directed to respond to motion for a new trial and motion for judgment of acquittal made at the close of the evidence, not later than 9/20/76--CURTIN, J.			
9/13/76	Filed Deft's motion for a new trial			
9/17/76	Filed Government's response to defendants' motion for a new trial and judgment of acquittal			

(OVER)

## Relevant Docket Entries.

" K "

UNITED STATES DISTRICT COURT  
CRIMINAL DOCKET

DATE 1976	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY			
		(a)	(b)	(c)	(d)
9/20/76	Return date for Briefs. Submitted.				
10/12/76	Motion by Deft. Demetroules to dismiss the Indictment. Motion denied. For sentence: Deft. Nicholas Demetroules fined \$2,000; Deft. NMD Film Distributing Co. fined \$2,000. Fines-to be paid within 30 days. Curtin, J.				
10/12/76	Filed defts' notice of appeal				
10/19/76	Filed Judgment				
10/21/76	copy of notice of appeal mailed to CCA, form A and copy of docket entries. deft's				
11/1/76	Filed/motion for extension of time for the payment of fines imposed 10/12/76, until 30 days after appeal is decided, with the Court's endorsement on motion granting extension-CURTIN, J.				
11/10/76	Filed Ct. steno's transcript of the proceedings of trial commencing on 7/20/76				
11/11/76	Filed Deft's request to charge				
11/11/76	Filed Govt's request to Charge				
11/11/76	Filed Govt's Suppl. request to Charge				

Indictment.

## In the District Court of the United States

For the Western District of New York

THE UNITED STATES OF AMERICA

-vs-

NICHOLAS DEMETROULES and  
NMD FILM DISTRIBUTING CO., INC.

NOVEMBER 1973 SESSION Term

No.

76 102

Vio. Title 18, U.S.C.,  
§1462COUNT I

## The Grand Jury Charges:

On or about the 5th day of December, 1973,  
in the Western District of New York, NICHOLAS DEMETROULES  
and NMD FILM DISTRIBUTING CO., INC., knowingly did use  
the Greyhound Bus Company, a common carrier, for carriage  
in interstate commerce from the State of New Jersey to  
the State of New York, of an obscene motion-picture film,  
entitled, "The Healers": in violation of Title 18,  
United States Code, §1462.

---

JOHN T. ELFVIN  
United States Attorney

A TRUE BILL:

J. Bedard G. Patt  
Foreman

## Extracts of Testimony.

1 PROCEEDINGS: August 16, 1976, 9:45 a.m.

2 APPEARANCES: As before noted.

3

4 (Defendant present.)

5 (Jury present.)

6

7 CHARGE OF THE COURT

8

9 THE COURT: I believe we are all here now, Mr.

10 Detsky, Mr. Demetroules, Mr. Burns and  
11 the Jury.

12 Ladies and gentlemen, I hope you all  
13 had a pleasant weekend and now we are  
14 back on the case. It will be my obliga-  
15 tion to charge you on the law at this  
16 time to the best of my ability. It is  
17 your job to take the law as I charge it  
18 to you and to apply it to the facts which  
19 you find from the evidence in the case,  
20 all the exhibits, the picture itself,  
21 what you recall from the viewing of it,  
22 the testimony of the witnesses. In this  
23 case, we have the testimony of the two  
24 expert witnesses that came in here. You  
25 should certainly consider their testimony

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1 and give it such consideration as you  
2 believe ought to be received under the  
3 facts and the law.

4 It is your job to go to the jury  
5 room and deliberate. That is to give  
6 your reasoned, conscientious views of  
7 the facts and the law to your fellow  
8 jurors and in an objective, dispassionate  
9 way; to listen to the same kind of con-  
10 siderations coming from them. You must  
11 remember that you cannot decide this case  
12 based upon any consideration of bias or  
13 prejudice or sympathy or some idea of  
14 what the sentence will be. The law  
15 provides that sentences in criminal cases  
16 in our country for the most part are  
17 determined by the Court and that is the  
18 case here and that is something which  
19 should not enter your mind or your con-  
20 sideration.

21 In this case on the one hand, you  
22 must, as far as you can, - it is a  
23 dilemma. I mean as a juror, you certainly  
24 act as a person and you cannot leave out, -  
25 for me to say that you must forget about

1 all of your own experiences and common  
2 sense and so forth would be an impossibility,  
3 but you are not here to exercise  
4 your individual view of what should be  
5 done about this case, but you are here  
6 to listen to the evidence and determine  
7 what community standards are under the law  
8 as I charge it to you so that it may be  
9 that you may say "As an individual person,  
10 my judgment is so and so, but as I look  
11 at the law and as I look at what the  
12 Court said, I find that the Government  
13 has failed to prove its case beyond a  
14 reasonable doubt", and if you determine  
15 that, then you would then vote to acquit.

16 In one sense during the course of  
17 the trial I have said several times that  
18 you were here to determine the issues as  
19 far as this particular film is concerned.  
20 In one sense, we cannot compare one film  
21 with another, the fact that other films  
22 may be shown or may not be shown. It  
23 simply is not the issue. On the other  
24 hand, it may have something to do with  
25 what are the community standards in this

1                   Western New York area so that to that  
2                   extent, what has been done other places  
3                   and other times and in places in this  
4                   community may be appropriate for you to  
5                   think about.

6                   We start off with the proposition,  
7                   and some of these thoughts I have given  
8                   to you before and if I have related to  
9                   them before, you are to consider them as  
10                  part of the charge. Whatever was said  
11                  during jury selection or during the course  
12                  of the trial, you should keep in mind as  
13                  part of my official charge to you. Some  
14                  of the things I have said to you in an  
15                  informal way and I will repeat them now  
16                  maybe in a more formal fashion, but  
17                  whether said once or said a number of  
18                  times, it is all important for your  
19                  consideration.

20                  We know that the defendant in any  
21                  criminal case is presumed innocent and  
22                  in this case, both the individual  
23                  defendant and the corporate defendant  
24                  are presumed innocent. You will have  
25                  two verdicts here, one for the individual

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1                   and one for the corporate defendant.

2                   We will send to you in the jury room the  
3                   indictment as a guide only. It is  
4                   brief, but we will send it to you. You  
5                   are to keep in mind that the indictment  
6                   itself is no evidence at all of any  
7                   criminal conduct on the part of either  
8                   defendant. It is to be an aid to the  
9                   defendant so that he can meet the charge  
10                  placed against him, know what he is charged  
11                  with and to be sure he is not charged  
12                  again for the same crime in a subsequent  
13                  criminal proceeding. That is the purpose  
14                  of the indictment. It is no evidence at  
15                  all.

16                  When you go to the jury room, it is  
17                  a good idea to pick one of your number as  
18                  your foreman to be spokesman if you come  
19                  back into court or to address a note to  
20                  the Court if you have any question and if  
21                  you do have a question about fact or law,  
22                  that is the way to proceed. Write a note,  
23                  give it to the marshal and he will deliver  
24                  it to me and we will have you back up and  
25                  we will discuss it. Some discussions may

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1                   be very brief and others may go on for  
2                   some time. I think maybe you were in  
3                   court the other day when the jury came in  
4                   and had a question about some of the  
5                   exhibits which weren't sent to them or  
6                   perhaps they had a question about reading  
7                   the summations. Some things we can do  
8                   for you and some things we cannot do for  
9                   you, but if you do have a question, make  
10                  sure that you write it out and send it  
11                  to me and in that way, we will have a  
12                  clear understanding, you and I, about what  
13                  we are supposed to do.

14                  The defendants here are presumed  
15                  innocent until you are convinced beyond  
16                  a reasonable doubt, by legal and compe-  
17                  tent evidence that the defendant is  
18                  guilty of the offense charged and that  
19                  determination as to each can only come  
20                  about through unanimous vote of the jury.  
21                  This is not a situation where a majority  
22                  counts. It must be by unanimous vote  
23                  before you can make a verdict of guilty.  
24                  This burden of proving the defendant  
25                  guilty beyond a reasonable doubt rests

1                   with the Government at all times. It  
2                   never shifts to the defendant. In order  
3                   to sustain its burden, the Government  
4                   must present proof which is sufficiently  
5                   strong to convince each juror of a defend-  
6                   ants guilt beyond a reasonable doubt.  
7                   This requirement that the prosecution  
8                   prove a defendant guilty beyond a reason-  
9                   able doubt extends to every essential  
10                  element of the crime charged against each  
11                  defendant.

12                  The law does not compel a defendant  
13                  in a criminal case to take the witness  
14                  stand and testify and no presumption of  
15                  guilt may be raised and no inference of  
16                  any kind may be drawn by the failure of  
17                  the defendant to testify in any criminal  
18                  case and that, of course, extends to  
19                  this case. I charge you the fact that  
20                  the defendant did not take the stand and  
21                  testify may not enter into your delibera-  
22                  tions and should not be mentioned or  
23                  given any consideration by you in any  
24                  fashion.

25                  The law, as I explained to you, does

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1 not impose upon the defendant of offer-  
2 ing any explanation. In this case, we  
3 did have the testimony of the witnesses.  
4 The defendant chose to put the witnesses  
5 on and you may consider their testimony  
6 as part of all the evidence in the case  
7 one way or another, but there is no  
8 obligation for him to do that.

9 We talked about reasonable doubt.

10 What is a reasonable doubt. It is a fair  
11 doubt based upon reason and common sense  
12 and arising from the state of the evidence.

13 It is rarely possible to prove anything  
14 to an absolute certainty. Proof beyond  
15 a reasonable doubt, therefore, is  
16 established if the evidence is such as  
17 you would be willing to rely and act upon  
18 in the most important of your own affairs.

19 A defendant is not to be convicted on  
20 suspicion, conjecture, surmise, guess,  
21 whimsy, any consideration like that.

22 It must be on the evidence. A reasonable  
23 doubt may arise not only from the evidence  
24 produced, but also from the lack of  
25 evidence.

1 Since the burden is upon the  
2 prosecution to prove the accused guilty  
3 beyond a reasonable doubt of every essen-  
4 tial element of the crime charged, a  
5 defendant has the right to rely upon  
6 failure of the prosecution to establish  
7 such proof.

8 A defendant may also rely upon  
9 evidence brought out on cross examination  
10 of witnesses for the prosecution. The  
11 law does not impose upon a defendant  
12 the duty of producing any evidence. A  
13 reasonable doubt is such a doubt as is  
14 based upon reason and as appeals to your  
15 power of logic. It is a doubt arising  
16 out of something tangible in the evidence  
17 in the case or something lacking in the  
18 case. If you feel uncertain and not  
19 fully convinced that a defendant is guilty  
20 of the crime charged and you believe you  
21 are acting in a reasonable manner and you  
22 believe a reasonable man or woman in any  
23 matter of like importance would hesitate  
24 to convict because of such doubt as you  
25 have, that is a reasonable doubt to the

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1                   benefit of which the defendant is  
2                   entitled. If you have such a doubt, you  
3                   must acquit.

4                   In order to determine facts in the  
5                   case, we turn to the testimony of the  
6                   witnesses and, of course, as to the  
7                   exhibits which are in evidence. In that  
8                   regard as far as the witnesses who have  
9                   testified, you should keep the following  
10                  in mind: You should carefully scrutinize  
11                  the testimony given, the circumstances  
12                  under which each witness has testified  
13                  and every matter in evidence which tends  
14                  to show whether the witness is worthy  
15                  of belief. Consider the witness'  
16                  intelligence, motive, state of mind,  
17                  demeanor and manner while on the stand.  
18                  Consider the witness' ability to observe  
19                  the matters as to which he has testified  
20                  and whether he impresses you as having  
21                  an accurate recollection in these matters.  
22                  Consider any relation which the witness  
23                  may have to either side of the case; how  
24                  he may be affected by the verdict and the  
25                  extent to which if at all the witness is

1                   either supported or contradicted by other  
2                   evidence in the case.

3                   Inconsistencies or discrepancies  
4                   in the testimony of a witness or between  
5                   the testimony of different witnesses may  
6                   or may not cause you to discredit such  
7                   testimony. In weighing the effect of a  
8                   discrepancy always consider whether it  
9                   pertains to a matter of importance or  
10                  an unimportant detail and whether the  
11                  discrepancy results from innocent error  
12                  or intentional falsehood.

13                  In this case, to summarize the  
14                  indictment, it charges that on or about  
15                  the fifth day of December, 1973, in this  
16                  Federal District, the defendants  
17                  Nicholas Demetroules and NMD Film  
18                  Distributing Co., Inc., knowingly used  
19                  the Greyhound Bus Company for carriage  
20                  in interstate commerce from the State of  
21                  New Jersey to the State of New York of  
22                  an obscene motion picture film entitled  
23                  "The Healers", a violation of Section  
24                  1462 of Title 18. That section in part  
25                  reads as follows: "Whoever knowingly

1           uses any express company or other common  
2           carrier for carriage in interstate or  
3           foreign commerce any obscene, lewd,  
4           lascivious or filthy motion picture film  
5           or other matter of indecent character,  
6           shall be guilty of an offense against  
7           the laws of the United States".

8           In the United States, we have what  
9           we call the First Amendment and it is  
10          most important we all recognize that the  
11          First Amendment to our Constitution  
12          guarantees to all of us the right to  
13          express our opinions and ideas freely.  
14          This is a most important concept. In  
15          the exercise of the Constitutional Right  
16          to free expression which all of us  
17          enjoy, sex may be portrayed and the  
18          subject of sex may be discussed freely  
19          and publicly so long as the expression  
20          does not fall within the area of obscenity.  
21          Our Constitution simply does not protect  
22          the interstate transportation of obscene  
23          material, but remember, it is the obliga-  
24          tion of the Government to prove this,  
25          the fact that these materials are obscene

1                   beyond a reasonable doubt. That is one  
2                   of the elements which the Government is  
3                   obliged to prove.

4                   It is not the purpose of the laws  
5                   regulating obscenity to subject an indi-  
6                   vidual to prosecution for transportation  
7                   of obscene materials unless these  
8                   materials depict patently offensive  
9                   sexual conduct.

10                  In order to prove this case, the  
11                  Government must prove beyond a reasonable  
12                  doubt the following essential elements;  
13                  first, that the defendant or defendants  
14                  used the Greyhound Bus Company, a common  
15                  carrier, to transport the motion picture  
16                  film "The Healers" in interstate commerce  
17                  from the State of New Jersey to the  
18                  State of New York. In that regard, I am  
19                  not going to review all of the evidence  
20                  in the case. It has been a short case.  
21                  You remember the testimony of Mr. O'Rourke  
22                  and the exhibits which are before you  
23                  about the practices of the Greyhound  
24                  Bus Company. You will also keep in mind  
25                  the cross examination and the argument of

1                   Mr. Detsky but from looking at these  
2                   documents and considering the testimony,  
3                   considering the bills of lading, the  
4                   other documents which are in the case,  
5                   it is up to you to make the decision  
6                   whether or not this film was transported  
7                   in interstate commerce from New York to  
8                   New Jersey to Buffalo. It may be simply  
9                   happenstance or it may be the fact that  
10                  the matter was routed there. That has  
11                  nothing to do, the fact that Mr.  
12                  Demetroules or another person shipping an  
13                  article was not aware of the route the  
14                  bus was going to take unfortunately is  
15                  of no assistance to him because if, in  
16                  fact, you find that this material, - it  
17                  was the intention of the person to ship,  
18                  and you find the other elements are  
19                  covered, and that the bus company did,  
20                  in fact, carry them through New Jersey  
21                  back to New York, then the interstate  
22                  aspect of this case is satisfactorily  
23                  taken care of.

24                  The Government must also establish,  
25                  beyond a reasonable doubt, that the

1 motion picture film "The Healers" is  
2 obscene, lewd, lascivious or filthy. I  
3 will give you further definition of what  
4 these words mean as we go on. Thirdly,  
5 that the defendant or defendants did the  
6 acts charged in the indictment knowingly.  
7 Again, further definition will be required  
8 as we go on.

9 What do we mean by the word "obscene".  
10 As used in Section 1462, the word  
11 "obscene" is limited to words which taken  
12 as a whole, appeals to the prurient  
13 interest in sex, which portrays sexual  
14 conduct in a patently offensive way and  
15 which taken as a whole do not have serious  
16 literary, artistic, political or scienti-  
17 fic value. In determining whether the  
18 film is obscene, you should answer the  
19 following questions:

20 (a) Whether the average person  
21 applying contemporary community standards  
22 and contemporary community standards are  
23 the standards which you find exist in  
24 the Western District of New York, -  
25 would find that the work taken as a whole

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1           appeals to the prurient interest, and  
2           secondly, whether the work depicts or  
3           describes sexual conduct in a patently  
4           offensive way and whether the work taken  
5           as a whole lacks serious literary, artistic,  
6           political or scientific value.

7           The following are some examples of  
8           obscenity:

9           One, patently offensive representa-  
10          tions or descriptions of ultimate sex  
11          acts, normal or perverted, actual or  
12          simulated.

13          Two, patently offensive representa-  
14          tions or descriptions of masturbation and  
15          lewd exhibition of the genitals.

16          If, pursuant to the instructions I  
17          have already given you, you should find  
18          that the movie "The Healers" contains  
19          prurient and patently offensive repre-  
20          sentations or descriptions of sexual  
21          conduct, then you may find the movie  
22          obscene unless you determine that the  
23          film has serious literary, artistic,  
24          political or scientific value.

25          In determining whether the film taken

1 as a whole appeals to the prurient inter-  
2 est, you should apply the contemporary  
3 community standards within the Western  
4 District of New York. That is, the  
5 seventeen western most counties in New  
6 York State which make up this judicial  
7 district and, of course, ladies and  
8 gentlemen, you are all from the Western  
9 New York community.

10 We have talked about the conscience  
11 of the community, contemporary community  
12 standards. In determining the common con-  
13 science of the community, you are to  
14 consider the community as a whole, men  
15 and women, the average person from all  
16 walks of life and in all sections of the  
17 Western New York commun. cy. We are not  
18 here to apply the standard of either the  
19 least sensitive or the most sensitive  
20 person. We are here to apply the standard  
21 of the average person as you find him to  
22 be in the community. I suppose that  
23 sometimes you say the average person  
24 never really exists. You know, what is  
25 the average American city, but that is

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1           a job, a task which you are going to  
2           wrestle with. In applying this test, the  
3           film must be measured by contemporary  
4           or current standards. That is the  
5           standards of the entire community, the  
6           seventeen counties in Western New York  
7           must be considered in determining the  
8           limits of candor in the depiction or  
9           representation of sex which are acceptable  
10          in this community.

11         Contemporary community standards are  
12         set by what is, in fact, accepted in the  
13         community as a whole and it is not what  
14         you like or dislike personally, but what  
15         is it you find are accepted as the  
16         standards for the community as a whole.  
17         That is to say by society at large, all  
18         people in general in the whole community  
19         and not by what some individual groups  
20         of persons may believe the community as  
21         a whole ought to accept or refuse to  
22         accept.

23         We are not here as reformers one  
24         way or another to have this thing move  
25         ahead in one fashion or to go in some

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1 other lane but we are here to determine  
2 from the facts in this case whether or  
3 not the community standards which you  
4 find to have been in effect here in 1973  
5 make this film beyond the line which has  
6 been drawn by the community as a whole.

7 In this case, you will note that the

8 indictment charges that defendants knowing-  
9 ly used the Greyhound Bus Company to  
10 carry an obscene motion picture film.

11 In that regard, generally speaking, an  
12 act is done knowingly if done voluntarily  
13 and intentionally and not because of  
14 mistake or accident or other innocent  
15 reason. The purpose of adding the word  
16 "knowingly" was to be sure that no one  
17 would be convicted for an act done because  
18 of mistake or accident or other innocent  
19 reason. None of us in this kind of a  
20 case or no defendant should be convicted  
21 because of simple carelessness or negli-  
22 gence, but you may find that defendants  
23 here acted knowingly if they had knowledge  
24 of the material in "The Healers" and that  
25 they knew the character and nature of

1                   the materials and that they knowingly  
2                   shipped the materials and that they knew  
3                   they were going to go from Buffalo to  
4                   New York, - or from New York to Buffalo,  
5                   I should say. Putting that around in  
6                   another fashion, we may put it this way:  
7                   Another of the essential elements of  
8                   the crime which the Government must prove  
9                   beyond a reasonable doubt is the element  
10                  of scienter or knowledge. That is, that  
11                  the defendants knew the contents of the  
12                  film which was transported in interstate  
13                  commerce.

14                  The Government does not have the  
15                  obligation of showing that the defendants  
16                  knew that the contents of the film were,  
17                  in fact, obscene if you determine whether  
18                  or not, in fact, that the film was  
19                  obscene. Therefore, if you find beyond  
20                  a reasonable doubt that the defendants  
21                  knowingly transported in interstate  
22                  commerce the film in question and that  
23                  they knew the contents of the film, -  
24                  that is, that they knew what the film  
25                  actually was and if you find beyond a

1 reasonable doubt that the film was, in  
2 fact, obscene within the meaning of the  
3 other instructions, then you may find  
4 the defendant had the requisite knowledge  
5 as we call it in the law.

6 It is not necessary to find a  
7 defendant guilty in this kind of a case  
8 that he would know beforehand that a  
9 court of law would hold that the picture  
10 was, in fact, obscene, but what he is  
11 obliged to know is what is the film  
12 about, what is the theme of the film,  
13 what did the film show and again, just  
14 to call to your attention, - I am not  
15 determining any facts, - there were  
16 the various fliers and brochures and  
17 so forth which were put out by the, -  
18 according to the argument of the  
19 Government, - by the Defendant which  
20 indicated that he knew what the film had  
21 to say, what the film was about and if  
22 you find beyond a reasonable doubt that  
23 he, in fact, did not know what the film  
24 was about and then under the law that,  
25 as I charge it, you find, in fact, that

1                   the film was obscene, then this element  
2                   of the crime charged is satisfied, but  
3                   remember in all of these things, it is  
4                   the obligation of the Government to prove  
5                   that element of the crime charged beyond  
6                   a reasonable doubt.

7                   Before we discuss words such as  
8                   "prurient interest", - before we get to  
9                   that, perhaps there are some other things  
10                  I should tell you. In this case here, we  
11                  have various steps, the film, when you  
12                  say, for example, that something moves  
13                  in interstate commerce, it is not  
14                  necessary that a defendant in a case like  
15                  this actually get in the bus and drive  
16                  it. We, of course, know that because in  
17                  our community nowadays as we take a  
18                  letter and we mail the letter, we know  
19                  that the post office is going to carry it  
20                  so when we put the film, if you find that  
21                  the film here was purposely placed in  
22                  travel by the defendant, that is sufficient.  
23                  The guilt of the defendant may be es-  
24                  tablished without proof that the defend-  
25                  ant personally did every act constituting

1                   the offense charged. The law provides  
2                   that whoever willfully causes an act  
3                   to be done which is directly performed  
4                   by him or another would be an offense  
5                   against the United States, he is  
6                   punishable as a principal. In other  
7                   words, every person who willfully par-  
8                   ticipates in the commission of a crime  
9                   may be found to be guilty of an offense.  
10                  Participation is willful if done  
11                  voluntarily and intentionally and with  
12                  a specific intent to do something the  
13                  law forbids or with a specific intent to  
14                  fail to do something the law requires  
15                  to be done. That is to say with a bad  
16                  purpose either to disobey or to disregard  
17                  the law.

18                  One of the defendants in this case  
19                  is a corporation. A corporation is a  
20                  legal entity, a person, and a corporation  
21                  may be found guilty of a criminal offense.  
22                  A corporation, of course, may only act  
23                  through the actual persons who are known  
24                  as its agents. In general, any agent or  
25                  representative of a corporation who has

1 adequate authority may bind the corpora-  
2 tion by his acts, declarations and  
3 omissions. In order to find a corpora-  
4 tion defendant guilty, you must find that  
5 all of the essential elements of the  
6 offense as set out in these instructions  
7 are present as to the corporation in the  
8 form of acts or omissions of agents of  
9 the corporation within their authority.  
10 The scope of authority of these agents  
11 is a question of fact for you to decide  
12 just as the other fact questions in the  
13 case.

14 Although a corporation may be held  
15 liable on the basis of an act or omission  
16 of any agent possessing adequate author-  
17 ity, a higher standard of proof is re-  
18 quired for individual defendants. In  
19 general, an individual defendant may be  
20 held criminally liable on the basis of  
21 an act or omission of another person  
22 only if it appears beyond a reasonable  
23 doubt that he willfully ordered or  
24 directed or willfully authorized or  
25 consented to the acts or omissions in

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question.

In this case, there is no question  
that Mr. Demetroules had nothing to do  
with the camera work, he wasn't the  
producer or the director, but you may  
find from all of the, - he is not charged  
with producing or directing the film,  
but he is charged and you are to keep  
your eye on what the charge is, he is  
charged with knowingly using the bus  
company for transport of this film from  
the State of New Jersey to New York.

We had here two expert witnesses in  
this case and as far as their testimony  
is concerned, you should keep the follow-  
ing in mind: All the notions I gave to  
you first of all about witnesses gener-  
ally, their ability to observe, their  
interest in the outcome of the litiga-  
tion, their demeanor and manner while on  
the stand, all of those things may be  
considered by you. Furthermore, you  
should keep in mind that usually the  
rules of evidence do not permit witnesses  
to testify as to opinions or conclusions.

H. T. Noel & E. F. Knisley  
OFFICIAL REPORTERS, U. S. DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

1 An exception to this rule exists as  
2 to those whom we call expert witnesses.  
3 They are witnesses who, by education and  
4 experience, have become expert in some  
5 art, science, profession or calling and  
6 may state an opinion as to relevant and  
7 material matters in which they profess  
8 to be expert and they also may state  
9 their reasons for the opinion. I am sure,  
10 ladies and gentlemen, that most of you  
11 here are expert in one field or another.  
12 A person is an electrician and has had  
13 years of experience in doing electrical  
14 work, he may be called, if there is a  
15 problem in a case to testify as to, for  
16 example, how a house should be wired or  
17 how a particular kind of complicated  
18 ventilating system should be wired, some-  
19 thing along that line. In any case,  
20 whether the man is an electrician or  
21 whether he is, as in this case, the  
22 professors who have done some study and  
23 work in the field, in order to evaluate  
24 that man's testimony, you should consider  
25 his background, his education, his experi-  
ence in the field, his standing in the

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OFFICIAL REPORTERS. U. S. DISTRICT COURT  
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1 field and all of those things and in  
2 addition, you must also consider his  
3 understanding of the facts in the case.  
4 Does his understanding of the facts in  
5 the case square with your understanding  
6 or the facts. That is for you to deter-  
7 mine because just as if an electrician  
8 came in to testify about how to wire a  
9 house and the plans submitted to him were  
10 different from the plans at issue,  
11 naturally, of course, you would say  
12 "He really was not familiar with the  
13 problem at hand because the facts were  
14 different". It is your job to listen to  
15 the testimony of the witnesses, keeping  
16 in mind your recollection of what the  
17 film was about and if your recollection  
18 of what the film presented was the same  
19 as the recollection of the experts, then  
20 that would mean that as far as his con-  
21 clusions, you may, depending upon his  
22 education and his experience, you may come  
23 to certain conclusions based upon his  
24 testimony. However, if you should find  
25 the facts to be different from what he

1                   found the facts then you may disregard  
2                   his opinion to that extent.

3                   Furthermore, as far as the law is  
4                   concerned, the law provides in a general  
5                   way that the Court must present the law  
6                   and if, in presenting a conclusion to you,  
7                   the expert witness, in addition to making  
8                   certain assumptions about what the facts  
9                   were in the case made certain assumptions  
10                  about what the law is or was and you  
11                  find that his assumptions about what the  
12                  law is are different from what the Court  
13                  charges to you, then you must accept the  
14                  direction of the Court on the law and  
15                  not the direction of the expert, and  
16                  again, it is up to you in making that  
17                  determination to determine how much of  
18                  the expert testimony you will accept,  
19                  how much you will reject. Those are  
20                  considerations based upon your careful  
21                  analysis of the testimony in the case,  
22                  careful analysis of all of the testimony  
23                  and exhibits in the case and your under-  
24                  standing of what the law is as I charge  
25                  it to you.

1                   In this case, you should consider  
2                   the testimony received from the experts  
3                   and give it such weight as you think it  
4                   deserves. If you should decide that  
5                   furthermore that the opinion of the  
6                   expert is not based upon sufficient  
7                   knowledge or experience of what the  
8                   contemporary community standards were in  
9                   our area in 1973, or if you should con-  
10                  clude that the reasons given in support  
11                  of the opinion are not sound, then you  
12                  may disregard or discount the opinion  
13                  to the extent that you feel to be justi-  
14                  fied under the circumstances.

15                 In this case, the Government did not  
16                 call an expert witness on the issue of  
17                 whether the film was obscene, as I have  
18                 described it to you. The Government is  
19                 not required to establish by affirmative  
20                 expert evidence that the film is obscene  
21                 because, ladies and gentlemen, you have  
22                 had the opportunity to look at the film  
23                 and as far as judging what the community  
24                 standards are and what they other elements,-  
25                 whether the Government has proven beyond

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1                   a reasonable doubt the other elements,  
2                   that is up to you to determine. However,  
3                   you should keep in mind in your analyzing  
4                   of all the evidence in the case the  
5                   Government, if it desired, if it chose,  
6                   could have called an expert to present  
7                   expert testimony if it desired.

8                   The evidence in this case consists  
9                   of the sworn testimony of the witnesses  
10                  and all the exhibits which are introduced  
11                  into evidence. If there are some exhibits  
12                  which have not been marked and sent to  
13                  you, then that is not part of the record  
14                  in this case and you should not guess or  
15                  speculate about what that material may  
16                  be.

17                  Unless instructed otherwise, anything  
18                  you may have seen or heard outside the  
19                  courtroom or outside the place where this  
20                  court has met during the case is not  
21                  evidence and must be entirely disregarded.

22                  There were several newspaper accounts of  
23                  our going to see the film and so forth  
24                  and I found nothing objectionable in  
25                  that material, but any articles like that

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1 or any articles you may have read or  
2 heard or any other, - anyone who has  
3 related to you about, - I don't know  
4 whether anyone has seen this film that  
5 you know, but certainly any comments  
6 or views that anyone else might have on  
7 this particular film should certainly  
8 be disregarded. You are to consider  
9 only the evidence in the case, but in  
10 your consideration of the evidence, you  
11 are not limited simply to the bald state-  
12 ments of what the witnesses testified  
13 to.

14 You are permitted to draw from the  
15 facts which you find have been proven  
16 such reasonable inferences as you feel  
17 are justified in the light of your own  
18 experience. This may become important  
19 in your analysis of whether or not the  
20 film presented in a serious way any  
21 artistic, scientific, political viewpoint.  
22 You will remember, of course, again, the  
23 evidence in the case, the arguments of  
24 the lawyers in this respect about the  
25 object of the film, what the film was

trying to display.

In determining whether the film you saw is obscene, you should keep in mind that you are only determining whether this film is obscene within the meaning of the law as I described it to you. While you should apply the contemporary community standards as they existed in December, 1973, you should not base your judgment on whether this film is obscene by comparing it with other similar films which were exhibited in this community in December of 1973. That is, comparing film by film. It is difficult to tell you to do that and at the same time, tell you to determine what the community standards would be. Certainly, you may take into account from the evidence in the case and also from your common sense viewpoint, what the community standards were, what kind of films were shown, what kind of books, as you recall Mr. Detsky's arguments about what kind of books are available at our book stores in our community; book stores such as Ulbrich's

1 here in the City of Buffalo or in your  
2 book stores in your own community. This  
3 you must take into account, all of this  
4 mix, the kind of advertisements which are  
5 in the newspapers which you see, the kind  
6 of things that are going on, but you  
7 cannot do it on a one-to-one basis, say,  
8 "They let a particular film show in a  
9 particular community, therefore, that  
10 means that this film is okay or it is  
11 not okay". You cannot do it one-to-one,  
12 but in making your judgment about what  
13 the community standards were, you may take  
14 into account the entire film, the entire  
15 picture of what kind of films were shown  
16 and what kind of books were available  
17 to be read. The fact that some films  
18 quite obviously obscene are being  
19 permitted, allowed or tolerated by local  
20 law enforcement agencies in certain  
21 areas and theatres does not thereby create  
22 a community standard. You must look at  
23 the community as a whole and again  
24 averages, - when you say "average", that  
25 means that some things may go beyond a

1           certain line and others may fall within  
2           a line and it is your judgment to try to  
3           draw the line where the average is.

4           To review briefly, the Government is  
5           required to prove three elements beyond  
6           a reasonable doubt. First of all, that  
7           the defendants or defendant used the  
8           Greyhound Bus Company to transport this  
9           film interstate. Secondly, that the  
10          motion picture film, "The Healers" is  
11          obscene, lewd, lascivious or filthy.  
12          In that connection, remember that the  
13          word "obscene" is limited to works which  
14          taken as a whole appeals to the prurient  
15          interest in sex which portrays sexual  
16          conduct in a patently offensive way and  
17          when taken as a whole do not have serious  
18          artistic, literary, scientific or political  
19          value.

20         In this regard, you must take the  
21         picture as a whole and not part by part,  
22         and in other words, there may be, if you  
23         find there were one or two scenes which  
24         violate the standard but when you take  
25         the picture as a whole and if you do find

1                   there is a serious literary or scientific  
2                   value to the film then, of course, the  
3                   statute would not be violated. It must  
4                   be measured by 1973 standards or maybe  
5                   current standards if you find they are  
6                   still the same and not by your individual  
7                   tastes. The standards of the entire  
8                   community must be considered in determin-  
9                   ing the limits of candor in the descrip-  
10                  tion or representation of sex which are  
11                  acceptable in the community.

12                  Contemporary community standards are  
13                  set by what is, in fact, accepted by the  
14                  community as a whole. That is to say  
15                  by society at large or adult people in  
16                  general and not by what some persons or  
17                  groups of persons may believe the  
18                  community as a whole ought to accept or  
19                  refuse to accept. It is a matter of  
20                  common knowledge that the customs change  
21                  and the community as a whole, may, from  
22                  time to time, find acceptable that which  
23                  was formerly unacceptable and not in-  
24                  frequently may find acceptable that which  
25                  some particular portion of the community

1 may define as an unacceptable appeal to  
2 prurient interest. In determining con-  
3 temporary community standards, you may  
4 consider what, as shown by the evidence  
5 in the case, appears in contemporary  
6 magazines, books, newspapers, television,  
7 motion pictures, novels and other media  
8 communication which are freely available  
9 in this Western New York community as  
10 a whole.

11 I have said this to you before, but  
12 I think it bears repeating; that people  
13 differ widely in their tastes with regard  
14 to the propriety of certain pictures.  
15 What may appear to some people to be bad  
16 taste or offensive may appear to be  
17 amusing or entertaining to others.  
18 Obscenity under the law is not a matter  
19 of individual taste. The personal opinion  
20 of a juror as to the material in question  
21 here is not the proper basis for a deter-  
22 mination of whether or not the material  
23 is obscene. As stated before, the test  
24 is how the average person of the community,  
25 as a whole, would view the material

1 presented.

2 You should keep in mind as far as  
3 your determining appeal to prurient  
4 interest that the mere fact that a picture  
5 of a nude woman may be sexually arousing  
6 or have some appeal to prurient interest  
7 does not meet the test. The appeal to  
8 prurient interest must be the predominant  
9 or principal appeal of the picture.

10 In other words, the principal appeal of  
11 the picture must be to a loathsome or  
12 morbid interest in sex as distinguished  
13 from a candid normal interest.

14 Ladies and gentlemen, it will be your  
15 job to go to the jury room, - I do not  
16 think we will send the canisters down.  
17 Is there some material on the canisters?

18 MR. BURNS: Yes, your Honor.

19 THE COURT: Perhaps so. All right. We will  
20 send the canisters down. As I explained  
21 to you when we were there and viewed the  
22 film, that we will not view the film a  
23 second time. If there is any other  
24 evidence in the case which you believe is  
25 necessary, if you do not think everything

1                   is there, let us know, but we will be  
2                   sure to send all the exhibits to you.  
3                   You recall there were several stipulations.  
4                   You may consider the stipulations just as  
5                   any other evidence in the case. Keep  
6                   in mind that you cannot find either de-  
7                   fendant guilty here unless you find him  
8                   guilty of each essential element of the  
9                   crime charged beyond a reasonable doubt.

10                  I will now ask you to step into the  
11                  corridor for a minute while I find out  
12                  whether the attorneys have any additional  
13                  requests to charge or any exceptions to  
14                  the charge as given. Do you want to step  
15                  out with the Marshal.

16                  (Jury escorted from the courtroom.)

17                  THE COURT:                   Mr. Burns.

18                  MR. BURNS:                   One matter, your Honor. I appreciate  
19                  that you advised that you would not charge  
20                  in the language from the Manarite case  
21                  regarding contemporary community standards  
22                  but I think that you did state that  
23                  contemporary community standards are set

1 by what is acceptable to society at  
2 large by adult people in general and I  
3 take exception to that. I think it  
4 narrows it to one classification of  
5 people rather than the entire society  
6 and I can appreciate the Court didn't  
7 want to call too much emphasis to the  
8 fact about children, but I think the  
9 Court went too far in the opposite  
10 direction.

11 THE COURT: Thank you, Mr. Burns, but I will  
12 not change the language. Mr. Detsky,  
13 do you have anything?

14 MR. DETSKY: Yes, your Honor. I respectfully  
15 appreciate that your Honor has tried to  
16 be very fair and very honorable in its  
17 charge and I wonder now, if it is nec-  
18 essary now to stress to the jury that  
19 the words "prurient interest" mean a  
20 filthy, loathsome, morbid interest in  
21 sex and I don't think they fully under-  
22 stood that from your Honor's discussion  
23 because he involved it with other parts  
24 of the charge.

25 I think also, if your Honor please,

1           I believe on Friday when we were before  
2           your Honor, we spoke about the picture  
3           lacks serious literary, artistic value  
4           Your Honor, in his charge, says that they  
5           must find that it has serious. I think  
6           there is a difference between lacking  
7           and has and also, your Honor said he  
8           would explain to the jury a lack of  
9           serious value means a lack of reasonable  
10          situation of artistic or literary values  
11          of the picture because we discussed whether  
12          serious would be explained to the jury  
13          which we did not do and so on that basis,  
14          I am asking your Honor if he would con-  
15          sider adding that to the charge he has  
16          already made.

17         THE COURT:           I suppose it depends on how, as far  
18                            as talking about serious literary,  
19                            artistic, political or scientific value,  
20                            if you say that the Government has the  
21                            obligation of proving that it offends,  
22                            then they also have the obligation of  
23                            proving that it lacks serious literary,  
24                            artistic, political or scientific value.

25         MR. DETSKY:           Right, if your Honor please, but in

1 your instructions to the jury, I believe  
2 on two or three occasions, you said  
3 "You must find that it has serious".

4 || THE COURT: All right.

5 MR. DETSKY: I think that that has, by dint of  
6 that error, shifted the burden to me to  
7 prove that it has when they have to prove  
8 that it lacks and I think there is quite  
9 a difference there and I would ask your  
10 Honor also to explain the word "serious"  
11 to the jury.

THE COURT: What do you say I should tell them?

13 MR. DETSKY: I think they may find when it says  
14 "lack of serious", that a reasonable man  
15 or woman would find it has absolutely  
16 nothing in the film that is of any worth-  
17 while nature.

18 THE COURT: I do not think that is a very good  
19 definition of "serious". As I discussed  
20 before, I asked you in the past, it is like  
21 the word "reasonable", - I asked you for  
a charge on "serious" before we began.

23 MR. DETSKY: Your Honor, I have looked up the word --

THE COURT: You were not able to help me then.

1 MR. DETSKY: Because I have found no charge in  
2 the books on that word "serious" and  
3 I have looked and I have seen no Court  
4 define it beyond what the Supreme Court  
5 has done because it hasn't just arisen  
6 and if your Honor recalls - -

7 THE COURT: Could I look at the dictionary,  
8 Mr. Detsky?

9 MR. DETSKY: No.

10 THE COURT: You do not want me to look at the  
11 dictionary.

12 MR. DETSKY: Because I don't think it is - -

13 THE COURT: Do they mean what they said or did  
14 they not mean what they said?

15 MR. DETSKY: "Lack of serious value" means that  
16 no reasonable man can accept it for any-  
17 thing worthwhile. I don't think I can  
18 pretend to be serious to you, but if you  
19 feel from a reasonable point of view that  
20 there is nothing serious about it as a  
21 reason person, you are now saying what  
22 I am saying, it has no serious content  
23 whatever. That means that as a reasonable  
24 man, you have concluded that I have said  
25 nothing worthwhile.

1 THE COURT: They must find that when you get  
2 right down to the facts here of the case  
3 is the jury obliged to find that the  
4 farcical elements here are mere gloss,  
5 they mean nothing at all, I suppose that  
6 would be it. What do you say about this,  
7 Mr. Burns?

8 MR. BURNS: Your Honor, my objection is slightly  
9 different. We discussed this at some  
10 length last Friday and obviously, I am  
11 sure Mr. Detsky tailored the remarks  
12 in his summation to what the Court told  
13 us it was going to charge and it is my  
14 understanding, - and so did I, of course,  
15 but it was my understanding before you  
16 charged that you weren't going to expand  
17 the word "serious" for lack of any better  
18 definition, so I adhered to my remarks  
19 as to that, and also I find absolutely  
20 no authority for Mr. Detsky's proposition  
21 that "serious" means what he says it  
22 means. In fact, I think to the contrary  
23 He would have you go back to the Roth  
24 Memoirs test which certainly is not the  
25 law.

1 THE COURT: That is true. I think your explana-  
2 tion goes to the Roth case.

3 MR. DETSKY: Well, they say "utterly" in Roth  
4 Memoirs, it was "utterly without re-  
5 deeming social value, utterly", and I  
6 am asking your Honor simply to say that  
7 it was the duty of the Government to prove  
8 that it lacked absolutely any serious  
9 value whatever.

10 THE COURT: Why don't I tell them that the  
11 Government has the burden of proving that  
12 element.

13 MR. DETSKY: Right, but my objection came when  
14 you said "does the picture have", and there  
15 is a difference.

16 THE COURT: I will explain that. I will say the  
17 burden in this instance must be upon the  
18 Government to prove beyond a reasonable  
19 doubt as to any element.

20 MR. DETSKY: Right.

21 THE COURT: Have the jury come back.

22 MR. DETSKY: Your Honor, will you also charge  
23 "prurient interest" so they understand  
24 it?

25 THE COURT: Pardon?

1 MR. DETSKY: "Prurient interest".

2 THE COURT: As far as that is concerned, I be-  
3 lieve I have said enough about it. I  
4 refuse to charge further on that.

5

6 (Jury returns to the courtroom.)

7

8 THE COURT: Ladies and gentlemen, you will recall  
9 that I have explained to you that one of  
10 the things that the Government, -  
11 assuming that the other elements are  
12 satisfied, the Government also has the  
13 burden of proving that the work taken as  
14 a whole lacks serious literary, artistic,  
15 political or scientific value. That is  
16 a burden upon the Government. It does  
17 not shift to the defendants. There is  
18 no burden that can be put on the defendant  
19 to explain that the work, in fact, did  
20 have serious literary, artistic,  
21 political or scientific value. He may,  
22 if he desires and he did in this case  
23 offer evidence. That does not mean that  
24 then the burden was shifted. The burden  
25 of proving this beyond a reasonable doubt

1                   that the work taken as a whole lacks  
2                   serious literary, artistic, political or  
3                   scientific value remains upon the  
4                   Government. It is their burden to prove  
5                   it. We have discussed other portions of  
6                   the charge and I refuse to charge further.  
7                   Mr. Robinson, will you step up, please.

8  
9                   (One male and one female deputy  
10                  United States Marshals sworn as custodians  
11                  of the jury.)

12  
13 THE COURT:       Will the two alternate jurors step  
14                  down, please, for a minute. Ladies and  
15                  gentlemen, you may go with the Marshal to  
16                  begin your deliberation. The exhibits  
17                  will be sent to you in the jury room.

18  
19                  (Jury retires to commence its  
20                  deliberation at 10:44 p.m.)

21  
22 THE COURT:       Mrs. Marshal and Mr. Concialde, the  
23                  case has now been submitted to the other  
24                  jurors. It happens so seldomly that I  
25                  do not think it is a problem, but could

1 you simply tell Mr. White where you would  
2 be during the day so he can get in touch  
3 with you in case one of the other jurors  
4 becomes ill or there is some other  
5 problem. Can you do that, and then in  
6 that event, we may ask you to come back  
7 and participate in the deliberation in  
8 this case. Mrs. Marshal, after this  
9 case is finished, you will be excused,  
10 so in the meantime, just conduct yourselves  
11 as if you are still members of the panel  
12 and do not talk to anybody about the  
13 lawsuit until you have word that it is  
14 completed.

23 MR. DETSKY: If I go anywhere, it will be just  
down for coffee.

25 THE COURT: All right. We will be in recess.

(Recess taken at 10:46 a.m. pending  
deliberation of the jury.)

\* \* \* \* \*

PROCEEDINGS: After recess 11-24

APPEARANCES: As before noted

(Defendant present.)

(Jury present.)

THE COURT: In United States against

Demetroules, et al., the jury is in the

box and defense counsel. Mr. Detakw is

here and the defendant, Mr. Demetroules.

is here and Mr. Burns for the Government.

Ladies and gentlemen. I have a note

from you. It reads "Is it necessary for

NMD to be aware that the bus was routed

through New Jersey to be guilty of

interstate commerce law", and the answer

is "yes". You remember in my char-

I explained to you that the corporation

must act through its agents and its

1 officers and the knowledge that they had,  
2 if any, it is up to you to find. If they  
3 had the knowledge that the bus was, or  
4 they had the knowledge that the material  
5 was being placed on the bus, that is  
6 sufficient. It is not necessary that the  
7 corporation know that whatever the route  
8 was that the bus was going to follow as  
9 long as they knew that the package was  
10 going to be delivered, to be shipped  
11 from New York City to Buffalo, that is  
12 enough. It is not necessary that they  
13 knew that the actual route was through  
14 New Jersey. That is a separate considera-  
15 tion. I think that you should now be  
16 able to go back and continue your deliberations.  
17

18 MR. BURNS: Your Honor, can we approach the  
19 bench before they leave?

21 (Off the record sidebar conference  
22 held between Court and counsel.)

24 THE COURT: I am afraid I was confusing. The  
25 question "Is it necessary for NMD to be

A55

1 aware that the bus was routed through  
2 New Jersey to be guilty of interstate  
3 commerce law". Of course, as you know,  
4 when you say "to be guilty of interstate"  
5 there is more to this than interstate  
6 commerce, but I think what you mean is  
7 is it necessary for NMD to be aware that  
8 the bus was routed through New Jersey  
9 and the answer to that is "no". I said  
10 "yes" before and I was mistaken. The  
11 answer to that is "no".

12 Now I think you should be able to  
13 go back and continue your deliberation.  
14 Thank you.

15 (Jury retires to resume its  
16 deliberation at 11:37 a.m.)  
17

18 \* \* \* \* \*

20 PROCEEDINGS: After recess, 12:54 p.m.  
21

22 APPEARANCES: As before noted.  
23

24 (Defendant present.)  
25

(Jury present.)

United States Court of Appeals  
for the Second Circuit

United States of America,

Plaintiff-Appellee,

against

Nicholas Demetroules and NMD Film Distributing Co., Inc.,  
Defendants-Appellants.

AFFIDAVIT  
OF SERVICE  
BY MAIL

STATE OF NEW YORK,  
COUNTY OF NEW YORK, ss.:

Jerry N. Simmons

, being duly sworn, deposes and says that he  
is over the age of 18 years, is not a party to the action, and resides  
at 25 Elliott Place, Bronx, New York  
That on December 20, 1976, he served 2 copies of Brief  
on and 1 Copy of Appendix

Theodore Burns, Esq.,  
Assistant U. S. Attorney,  
United States Courthouse,  
Buffalo, New York, 14202.

by depositing the same, properly enclosed in a securely-sealed,  
post-paid wrapper, in a Branch Post Office regularly maintained by  
the United States Government at 350 Canal Street, Borough of Manhattan,  
City of New York, addressed as above shown.

Sworn to before me this  
20th day of December, 1976.

BEST COPY AVAILABLE